

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

AFFIDAVIT

Civil Action No.
06 CIV 3755

Judge McMahon

Defendants.

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

LOUIS E. GITOMER, being duly sworn, deposes and says:

1. I am an attorney who was employed by the Interstate Commerce Commission (the "Commission") from on or about January 1, 1976 through

January 31, 1987. I served as an Attorney-Advisor, Supervisory Attorney, and then, as of December 1982, Deputy Director of the Section of Finance, the Rail Section and the Motor Section. As Deputy Director of the Section of Finance and the Rail Section, positions I held between December 1982 and May 1986, I supervised an office of up to 100 attorneys and was responsible for the preparation of the Commission's legal and policy decisions and rulemakings concerning railroad entry (49 U.S.C. §10901), exit (49 U.S.C. §10903, et seq.), consolidations (49 U.S.C. §11321, et seq.), rates (49 U.S.C. §10701, et seq.), operations (49 U.S.C. §11101), exemptions (49 U.S.C. §10502), and jurisdictional issues including questions of whether certain railroad property was a line of railroad or an excepted spur, industrial, team, switching, or side track (49 U.S.C. §10906). I wrote, reviewed and directed the preparation of thousands of decisions. Since 1987, I have regularly practiced before the Commission and its successor the Surface Transportation Board (the "Board").

2. I have been asked by the Village of Croton-on-Hudson to review the record in this matter concerning the claim by the Buffalo Southern Railroad, Inc. ("BSOR") that its purported operation of the site owned by Greentree Realty (improperly called the Croton Yard by BSOR) and including 1,600 feet of track (referred to herein as "Greentree Yard"), does not require Board approval or exemption because the track is properly classified as excepted spur track under 49 U.S.C. §10906.

The Northeast Interchange Railway, LLC proposal.

3. I have also reviewed the record before the Board in Northeast Interchange Railway, LLC–Lease and Operation Exemption–Line in Croton-on-Hudson, New York, STB Finance Docket No. 34734 (“FD 34734”).

4. The Verified Notice of Exemption (the “Notice”) filed by Northeast Interchange Railway, LLC (“NIR”) with the Board on August 1, 2005, pursuant to 49 C.F.R. 1150.31 (See Exhibit 5 to the Affidavit of Marianne Stecich), sought an exemption to operate the Greentree Yard as a common carrier regulated line of railroad requiring Board approval or exemption prior to the start of operations under 49 U.S.C. §10901.

5. By decision served on November 18, 2005 (See Exhibit 7 to the Affidavit of Marianne Stecich), the Board rejected the Notice because “the factual and legal issues presented in the pleadings filed to date demonstrate that NIR’s proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR’s predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste.”

Board jurisdiction over the lease of track by a railroad.

6. Before a railroad is permitted to acquire another line of railroad, it must obtain approval from the Board pursuant to 49 U.S.C. §10902(a) or 49 U.S.C. §11323. Before a railroad is permitted to acquire an excepted track, as defined in 49 U.S.C. §10906, which through use will become a line of railroad, it must obtain approval from the Board pursuant to 49 U.S.C. §10901.

7. The lease of a rail line is considered an acquisition of a rail line under 49 U.S.C. §10902 by the Board.

8. The Commission was created in 1887 to provide Federal regulation of the interstate railroad system and replace the ineffective patch work of state and local railroad regulation that was affecting interstate commerce. In addition to the lines of railroad, railroads operate over other track connected to their main lines in order to provide ancillary service to their customers, such as switching, pick-up, and delivery. These ancillary tracks are called spur, industrial, team, switching, or side tracks. Since the main line track to which these other tracks are connected, and the railroads that operated the main line track, were regulated by the Commission, it was thought appropriate for the minor transactions involving clearly auxiliary track to be excepted from the federal regulatory process. Prior to the ICC Termination Act of 1995 (which established the Board), spur, industrial, team, switching, or side track were subject to state and local regulation. In the ICC Termination Act, spur, industrial, team, switching, or side track were subjected to Board jurisdiction, for the limited purposes of construction,

acquisition, operation, abandonment or discontinuance (49 U.S.C. §10501(b)(2)), but then excepted from Board review (49 U.S.C. §10506). Provision of rail service over a spur, industrial, team, switching, or side track has never been interpreted as a blanket preemption of state and local law otherwise applicable to a facility.

9. The Board determines whether a track is a spur track or a line of railroad on a case-by-case basis. *CNW–Aban. Exemp.–In McHenry County, IL, 3 I.C.C. 366 (1987), rev'd on other grounds sub nom. Illinois Commerce Comm'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989).*

10. To determine whether a track is a line of railroad or a spur track, the Board considers (a) whether the track extends into a territory not previously served by the railroad; (b) whether the track extends into territory already served by another railroad; (c) the use of the track; (d) the physical characteristics of the track; (e) the length of the track; (f) the number of shippers to be served; (g) whether the track is stub ended; (h) if there is regularly scheduled service on the track; (i) the owner of the track; and (j) who maintains the track. *The New York City Economic Development Corporation-Petition for Declaratory Order*, STB Finance Docket No. 34429 (STB served July 15, 2004).

11. The most important determinant used by the Board is whether the track is extending into a territory not previously served by the railroad. *Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry.*, 270 U.S. 266, 278 (1926); *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364, 367 (D.C. Cir. 1983).

12. I am not familiar with any case in which the Board has concluded that it has no authority over the operation of a rail carrier providing common carrier services through the invasion of a new territory because the rail carrier claimed that it was only operating over a "spur." As explained above, a "spur" track is incidental to rail transportation. Where a rail carrier seeks to enter a new territory and offer common carrier services over what had formerly been a spur, Congress did not intend to preclude the Board's jurisdiction. *See United Transportation Union-Illinois Legislative Board v. Surface Transportation Board*, 183 F.3d 606 (7th Cir. 1999). This is precisely the kind of situation in which Congress intended the Board to exercise its authority.

BSOR's current and proposed operations.

13. Prior to commencing operation of the Greentree Yard, BSOR claims to have operated approximately 32 miles of track in Erie County, NY as a common carrier railroad and switching services in Tonawanda, NY. Feasley Affidavit, paragraph 2. Because BSOR's common carrier operation is hundreds of miles away from the Greentree Yard, BSOR must obtain approval or exemption from the Board to commence operations when it proposes to invade the territory of another railroad, as BSOR intends.

14. There is a freight yard to the north of the Greentree Yard. Feasley Affidavit, paragraph 6. The freight yard and the CSX Transportation, Inc. ("CSXT") line are the territory that BSOR is invading with a transload facility that could be located at either of those locations.

15. Although BSOR claims that it will interchange traffic with CSXT at its connection to the Greentree Yard (Feasley Affidavit, paragraph 12) the only points of interchange between BSOR and other railroads indicated by BSOR on its web site (members.aol/buffalosouthern/services.html) are BC [Buffalo Creek] Junction and Gowanda, both near Buffalo, NY. The only interchange with CSXT is at BC Junction. See also the CSXT web site at csx.com/?fuseaction=customers.sl_directory-detail&i=2154. In order to open an interchange, an Interchange Update Form must be executed by BSOR and CSXT and presented to the Rail Link, a subsidiary of the Association of American Railroads that processes all car movements. All industry and corporate reference files would have to be updated before an interchange could be opened. CSXT has established an Interchange Committee for the purpose of approving interchanges with other railroads. Upon information and belief, the CSXT Interchange Committee has not received a request to open an interchange with BSOR at Croton-on-Hudson or anywhere in that vicinity.

16. A rail carrier is only required to provide interchange with another rail carrier between their lines of railroad. 49 U.S.C. §10742. If BSOR is not operating as a rail carrier or is not operating over a line of railroad (such as over a spur track), then CSXT has no obligation under the law to interchange traffic with BSOR. On the other hand, if BSOR wishes to operate as a common carrier with a right to interchange traffic with CSXT, then it must first obtain authorization or exemption from the Board to lawfully operate the Greentree Yard.

17. Based on information and belief, BSOR has not entered an agreement to interchange rail traffic with CSXT onto the Greentree Yard.

18. BSOR proposes to provide common carrier service to the Greentree Yard. Feasley Affidavit, paragraph 11 and Exhibit A, paragraph 3.

19. BSOR proposes to provide common carrier service over Greentree Yard to Hanson Aggregates New York, Inc. (Meehan Affidavit), Coastal Distribution, LLC (Rutigliano Affidavit) and other businesses (Feasley Affidavit, paragraph 28).

20. Without an interchange agreement with CSXT, BSOR cannot undertake the common carrier services it has just begun to offer, because its customers' freight cars will not be able to enter or leave the site.

BSOR requires Board approval or exemption before it can lawfully commence the common carrier operation it proposes at Greentree Yard.

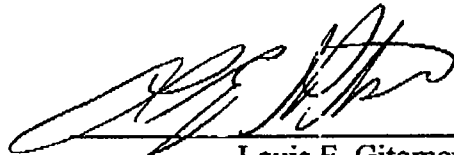
21. BSOR has not obtained approval or exemption to operate the Greentree Yard as a common carrier.

22. The Board has not determined whether the Greentree Yard is a line of railroad or a spur track. Because BSOR proposes to invade the territory served by CSXT and the rail yard north of Greentree Yard, it appears that BSOR will operate the Greentree Yard as a line of railroad and not as a spur track.


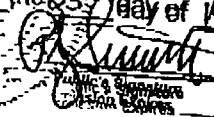
23. Prior to lawfully operating an additional line of railroad under a lease, BSOR must obtain approval or exemption from the Board under 49 U.S.C. §10901 or §10902. Anyone that operates an additional line of railroad without Board

approval or exemption is subject to penalties of up to \$5,000 per day. See 49 U.S.C. §11901.

24. BSOR should thus halt its apparent unlawful operation until the Board determines (a) whether Greentree Yard is a line of railroad or spur track; and (b) whether to approve or exempt BSOR's lease and operation of Greentree Yard.


Louis E. Gitomer

Sworn to before me this 23rd day of May, 2006.

State of Washington
County of DC
Sworn to and subscribed before me on
the 23rd day of May, 2006


Notary Public
My Comm. Expires _____

PAMELA J. SMITH
District of Columbia
My Commission Expires
January 14, 2011